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## I. INTRODUCTION

The Texas Office of Public Utility Counsel (“OPC”) represents residential and small business consumers of Texas in telephone proceedings before the Texas Public Utility Commission, the Federal Communications Commission and in various state and federal courts. The OPC hereby submits its Reply Comments in rebuttal to the Initial Comments filed in response to the May 23, 2001 Further Notice of Proposed Rulemaking (“FNPRM”),<sup>1</sup> FCC No 01-157. This FNPRM sought comment on the Recommended Decision of the Federal-State Joint Board on Universal Service (“Joint Board”) regarding the Rural Task Force’s (“RTF’s”) recommendation to freeze high cost loop support on a per-line basis in rural carrier study areas where a Competitive Eligible Telecommunications Carrier (“CETC”) initiates service.<sup>2</sup> The OPC filed Initial Comments in this proceeding on July 5, 2001.<sup>3</sup>

As in its Initial Comments, the OPC maintains its support of the RTF objective to prevent excessive growth in the High Cost Loop Fund. However, the OPC disagrees with the RTF recommendation to freeze per-line support in a rural study area when a CETC initiates service. Instead, the OPC proposes that the Commission guard against excessive growth in the High Cost Loop Fund by freezing high cost loop support on a per-line basis in rural carrier study areas

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<sup>1</sup> In the matter of Federal-State Joint Board on Universal Service, Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers, CC Docket Nos. 96-45, and 00-256, FCC No. 01-157, Fourteenth Report and Order, Twenty Second Order on Reconsideration, and Further Notice of Proposed Rulemaking, Adopted May 10, 2001, Released May 23, 2001. (“Order and FNPRM”).

<sup>2</sup> In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45, FCC 00J-4, Recommended Decision, Released December 22, 2000.

when an *incumbent* rural carrier loses a specified percentage of its access lines. This alternative approach would correctly tie the triggering of the funding freeze to the relevant *result* of competitive entry, i.e. lines lost by the incumbent to competitors, rather than simply to the fact of competitive entry *per se*.

**II. The Commission should be proactive and guard against the possibility that the size of the High Cost Loop Fund will grow uncontrollably as a result of competitive entry.**

OPC disagrees with Commenters that contend that the Commission needs only to adopt a “wait and see” approach to determining whether or not a freeze on per-line support is necessary over the next five years.<sup>4</sup> Simply monitoring the development of competition in rural areas over the next five years is not an adequate measure. If the Commission chooses to only monitor the development of competition in rural areas, and CETC entry is found to have an adverse effect on the level of High Cost Loop support in rural areas, then the Commission will have failed to protect end-users against excessive growth in the High Cost Loop Fund. The OPC believes that the Commission should adopt an appropriate, proactive mechanism at this time to guard against the potential for excessive growth in the High cost Loop Fund as a result of CETC entry into rural areas.

The Commission should not delay any longer in protecting end-users from excessive growth in the High Cost Loop Fund. However unlikely, the Commission needs to prepare for CETC entry and establish an appropriate

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<sup>3</sup> Texas Office of Public Utility Counsel Comments, July 5, 2001 (“OPC Comments”).  
<sup>4</sup> USTA Comments at 2; GVNW Comments at 3-4.

mechanism that will address the possibility of excessive growth in the High Cost Loop Fund. The “Competitive Erosion-Based Trigger”, which OPC proposed in its Initial Comments,<sup>5</sup> is the appropriate mechanism to ensure that the High Cost Loop Fund does not grow uncontrollably.

**III. The Commission should retain its previously determined rules regarding the portability of support to Competitive Eligible Telecommunications Carriers.**

OPC disagrees with several commenters that advocate the use of CETC costs to develop CETC support.<sup>6</sup> CETCs and ILECs have vastly different reporting requirements, and requiring CETCs to report their own costs would be administratively burdensome and hamper the development of competition in rural areas.

The recurring suggestion by the commenters in this proceeding is that a CETC will benefit from the incumbent’s level of Universal Service support because the level of incumbent support is inherently in excess of the CETC costs of providing the supported services, and therefore a CETC should only receive support based on its own costs.<sup>7</sup> The OPC has two responses to this erroneous argument: (1) The Telecommunications Act, which applies to *both* incumbent and competitive carriers receiving Universal Service support, requires that a “carrier that receives such support shall use that support for the provision of maintenance, and upgrading of facilities and services for which the support is

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<sup>5</sup> OPC Comments at 9.

<sup>6</sup> USTA Comments at 5; NRTA/OPASTCO Comments at 2-8; NTCA Comments at 3-4.

intended,”<sup>8</sup> and: (2) according to the Commission, if a CETC can “serve the customer’s line at a much lower cost than the incumbent, this may indicate a less than efficient ILEC. The presence of a more efficient competitor will require the ILEC to increase its efficiency or lose customers.”<sup>9</sup>

The Commission has committed to using the next five years of the RTF Plan to transition to a long-term Universal Service plan for rural carriers that is better coordinated with the non-rural mechanism.<sup>10</sup> In all probability, Universal Service support in five years will be determined using a more appropriate mechanism, perhaps a forward looking mechanism, and the argument for using CETC costs to develop CETC support will be moot.

The Montana Telecommunications Association (“MTA”) is concerned with the possibility that CETCs will “game” the Universal Service system by “manipulating customer information, selectively serving certain areas, or engaging in a variety of other forms of support arbitrage.”<sup>11</sup> Section 214 (e) of the Telecommunications Act requires that in order to be certified as an eligible telecommunications carrier, a carrier must provide and advertise its service throughout the entire service area, therefore the CETC *cannot* profit from limiting service to low cost areas.<sup>12</sup> Furthermore, the OPC is unaware of any opportunities for CETCs to “manipulate customer information” or to engage in

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<sup>7</sup> *Id.*

<sup>8</sup> Telecommunications Act of 1996, Section 254 (e).

<sup>9</sup> In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45, FCC 97-157, Report and Order, adopted May, 7 1997 and released May 8, 1997, para. 289. (“Universal Service Order”)

<sup>10</sup> *Order and FNPRM* at para. 8.

<sup>11</sup> Montana Telecommunications Association Comments at 3.

<sup>12</sup> Telecommunications Act of 1996, Section 214 (e).

“support arbitrage,” that is not equally available to Incumbent carriers. Indeed, the OPC agrees in part with MTA that the Commission and the state Commissions should safeguard against abuses of the Universal Service support system by *all* participating carriers.

**IV. The Commission should adopt OPC’s proposed alternative mechanism: the Competitive Erosion-Based Trigger.**

OPC supports the objective of controlling potentially-excessive growth in the High Cost Loop Fund that eventually might arise from competitive entry into rural regions. However, OPC believes that the RTF recommendation to use CETC entry as a trigger for freezing per-line support is flawed, because it is not competitive entry per se that could increase support levels inappropriately. Indeed, if rural carriers’ needs for High Cost Loop Fund support were assessed accurately (*i.e.*, by a forward looking costing approach), a CETC’s capture of lines formerly served by the incumbent rural carrier would have no effect on the overall fund size, since the incumbent’s calculated support level would decrease commensurately with the support thereafter provided to the CETC.<sup>13</sup>

Instead, the Commission should adopt a trigger mechanism that focuses on the effects that competitive entry may have on the incumbent rural carriers, namely their potential loss of access lines to competitors. As OPC proposed in its Initial Comments, High Cost Loop support on a per-line basis should be frozen

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<sup>13</sup> If the CETC acquired “new” lines not previously served by the incumbent rural carrier, the overall support requirement might well grow, but that would be indistinguishable from the case of new growth served by the incumbent and just as legitimately would qualify for support.

when CETC entry has occurred and an incumbent rural carrier has lost a specified percentage of its access lines. Under the Competitive Erosion-Based Trigger that OPC is proposing, an incumbent rural carrier's access line loss would be measured from the year in which the first CETC was certified in a study area. For rural study areas where there is a CETC already certified, access line loss would be measured from the start of the RTF plan. Access line growth would be calculated annually,<sup>14</sup> and when the incumbent rural carrier loses a specified percentage of access lines to competition,<sup>15</sup> per-line support in that study area will be frozen. OPC recommends that a uniform percentage threshold be adopted for all rural carriers and study areas, and suggests that a line loss of ten percent would be a reasonable value to apply. Working line data is already provided by the incumbent rural carrier to the Universal Service Administrative Company, for purposes of calculating Universal Support, so that this proposal would not result in any additional administrative burden on the incumbent rural carrier.

**V. Frozen per-line support should be increased annually by only an inflation factor, not the Rural Growth Factor, as proposed by the Rural Task Force.**

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<sup>14</sup> Currently rural carriers are only required to report cost and line data annually on July 31<sup>st</sup> for the prior year. See FNPRM and Order at para. 127, footnote 330.

<sup>15</sup> In fact, lines could be lost due to other factors, such as declines in population or other demographic shifts in the study area. Our proposed trigger would properly adjust the incumbent's support for those effects as well as actual competitive losses, whereas the RTF's trigger proposal would not.

The OPC agrees with AT&T that the inclusion of access line growth in the RGF results in a double counting of access line growth.<sup>16</sup> As explained in The OPC's Initial Comments,<sup>17</sup> it is unnecessary and redundant to apply a factor that represents growth in access lines to the *per-line* support value, because the per-line support value will be applied to a revised number of access lines that already, by definition, reflects growth in access lines. Therefore, the Commission should only apply an inflation factor (the Gross Domestic Product-Chained Price Index ("GDP-CPI")) to frozen per-line support.

#### **VI. The potential for stranded costs is minimal.**

Several Commenters in their Initial Comments claimed that freezing per-line support would result in Incumbent carrier "stranded costs."<sup>18</sup> As discussed in OPC's Initial Comments,<sup>19</sup> OPC is concerned that the Commission has accepted without sufficient scrutiny the RTF's assumption that a telecommunications carrier's costs are essentially fixed (i.e., invariant relative to a range of outputs) in the context of assessing universal service funding requirements.<sup>20</sup> In general, the cost structure for a telecommunications carrier will have a mix of fixed and variable costs, with the degree of variability dependent upon the time horizon assumed, among other things. The High Cost Loop Fund, which is an issue of concern in this proceeding, is intended to

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<sup>16</sup> AT&T Comments at 5.

<sup>17</sup> OPC Comments, at 10-11.

<sup>18</sup> NTCA Comments at 6; Nebraska Rural Independent Companies Comments at 6-8.

<sup>19</sup> OPC Comments, at 14-16.

support carriers with high *loop costs*, and loop costs represent a particular subset of rural carriers' overall costs of service. Because loop plant is deployed on particular geographic routes, it tends to be less fungible (especially in the distribution portions) than other carrier facilities, such as switches, when demand patterns change. However, concerns about stranded loop plant are largely mitigated by the fact that most customers who migrate to alternative local service providers are still served by the same underlying loop facility, via either a UNE arrangement or resale. Moreover, other elements contributing to loop costs, such as billing and other customer service functions, repair and maintenance activities, and certain administrative support functions, do tend to be variable with demand, particularly if changes in access line demand will occur over a relatively long timeframe.

Even if incumbent rural carrier's embedded loop costs were fixed to some degree, the Competitive Erosion-Based Trigger that OPC proposes would allow ample time for the incumbent rural carrier to adjust to competition. First, an incumbent rural carrier is aware of its number of working access lines, and should be able to anticipate with some measure of accuracy when its access line count will fall below the trigger threshold, if ever. Unlike the RTF recommendation, per-line support is not frozen immediately after a CETC initiates service – which may not be as easily predicted by an incumbent rural carrier.

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<sup>20</sup> *Order and FNPRM* at para. 125.

Second, an incumbent rural carrier will continue to recover an offset of their costs by other means. Not only does an incumbent carrier have the ability to develop alternative sources of revenues (such as vertical features and, for some carriers, Internet access technologies such as xDSL), but an incumbent rural carrier will continue to recover or offset their costs through the provisioning of UNEs and resold services. In fact, if a CETC exclusively provides service through UNEs, it will only receive a level of Universal Service support that does not exceed the price of the UNEs to which it purchased access.<sup>21</sup> Given that many competitive carriers are relying on UNEs to deliver their services to customers, the incumbent rural carrier may still be receiving substantial revenues from the UNEs associated with the access lines served by the CETC.

## **VII. CONCLUSION**

In these Reply Comments, OPC has demonstrated that the adoption of the RTF's recommendation to freeze per-line support in a rural study area when a CETC initiates service will not effectively address legitimate concerns about excessive growth in the High Cost Loop Fund. The freezing of per-line support should be tied to the potential *effect* of competitive entry, *i.e.*, incumbent carrier's loss of access lines, and not to competitive entry *per se*. Therefore, OPC urges the Commission to adopt the Competitive Erosion-Based Trigger that we have described, in order to allow competition to grow in rural areas without adverse

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<sup>21</sup> *Universal Service Order* at paras. 175 and 312.

consequences to the objective of universal service and affordable telephone service to all of the nation's consumers.